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NO. 07-183

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

EDDIE GILMER
Petitioner

versus

STATE OF MISSISSIPPI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE MISSISSIPPI SUPREME COURT INTERPRETATION OF A CRIMINAL STATUTE IS CONSTITUTIONALLY VAGUE AND OVERBROAD.

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BRIEF IN OPPOSITION

This matter is before the Court on the petition of Eddie Gilmer for a Writ of Certiorari to the Supreme Court of Mississippi wherein the court below, on direct appeal of a jury verdict, affirmed Gilmer's convictions and sentences for five counts of video voyeurism.

OPINION BELOW

The opinion of the Mississippi Supreme Court affirming the convictions and sentences for video voyeurism is reported as *State v. Gilmer*, 955 So. 2d 829 (Miss. 2007). The opinion may be found as "Appendix A" of Petitioner's request for writ of certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to the authority of 28 U.S.C. § 1257 claiming the statute as applied is overbroad and has a chilling effect on the First Amendment right to free expression.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner has identified Constitutional provisions as set forth in the Brief of Petitioner. U.S. Const. Amend. I & XIV.

STATEMENT OF THE CASE

The course of proceedings and facts are accurately reflected in the Brief of Petitioner as taken from the opinion of the court below. (Br. of Pet., App. A, *State v. Gilmer*, 955 So. 2d 829, (¶¶2-4)(Miss. 2007)).

SUMMARY OF THE ARGUMENT

MISSISSIPPI SUPREME COURT STATUTORY CONSTRUCTION OF A CRIMINAL STATUTE DOES NOT HAVE A CHILLING EFFECT ON LEGITIMATE FIRST AMENDMENT EXPRESSION.

REASONS TO DENY THE WRIT

MISSISSIPPI SUPREME COURT STATUTORY CONSTRUCTION OF A CRIMINAL STATUTE DOES NOT HAVE A CHILLING EFFECT ON LEGITIMATE FIRST AMENDMENT EXPRESSION.

Petitioner adopts and presents as its petition for writ of certiorari the dissenting opinion of the Mississippi State Supreme Court opinion. (Pet. Br. footnote 1).

The statutory provision under which petitioner stands convicted is:

> **Miss. Code Ann. § 97-29-63. Photographing, taping, or filming person in violation of expectation of privacy.**
>
> Any person who with lewd, licentious or indecent intent secretly photographs, films, videotapes, records or otherwise reproduces the image of another person without the permission of such person when such a person is located in a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, private dwellings or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom shall be guilty of a felony and upon conviction shall be punished by

> a fine of Five Thousand Dollars ($5,000.00) or by imprisonment of not more than five (5) years in the custody of the Department of Corrections, or both.

The opinion of the Mississippi Supreme Court was the first time the State's highest court interpreted this statutory provision. *Gilmer*, ¶1.

The Mississippi Supreme Court specifically addressed the issues of vagueness and First Amendment freedom of expression as raised in the dissent – and now presented as the reasons to grant certiorari.

> FN1. We take seriously our responsibility to neither enlarge nor restrict a statute. Traylor, 100 Miss. at 558-59, 56 So. 521. The dissent alleges that we have restricted the statute in doing away with a portion of the location element. Quite the contrary, we have parsed the requirement to give effect to all the words in the statute. The proof of location must either meet the two descriptors, in which case both must be proven, or establish that the victim was in one of the explicit locations named in the statute, which according to the structure and plain language of the statute indicate that such locations are deemed by the legislature as meeting the two descriptors. These places are per se places where a person intends

> to be in a state of undress and has a reasonable expectation of privacy. It seems the dissent would have us discard such a list of places as meaningless and superfluous. The legislators did not choose to precede the list with potentially ambiguous language, such as "for example" but with the word "including" which indicates that the preceding word or phrase is definitely encompassed by the subsequent word or phrase. The only reading which gives effect to the plain meaning of each word and phrase in the statute is that which acknowledges that the Legislature laid out two routes by which the State can prove the location element. We simply give effect to each phrase. The dissent attempts to point out a restrictive approach by the majority, when, in fact, it is the dissent who attempts to restrict the language of the statute and disregard an entire listing of locations in the statute as superfluous.
>
> *Gilmer v. State,* 955 So.2d 829 (Miss. 2007)(Footnote 1).

Additionally, and specifically the Mississippi Supreme Court specifically addressed the 'due process' concerns, as well as the First Amendment concerns. *Gilmer*, fn.2.

> FN2. In order to prevent potential confusion resulting from the dissent's allegations of a due process violation in that we have removed the burden of proving lewd intent, this Court reiterates the requirement that the State must

prove each element of this statutory offense in order to obtain a valid conviction. As for what is sufficient to prove this element, since Gilmer did not raise an issue of sufficiency of evidence of lewd intent, that issue is not before this Court, and therefore, we will not engage in an examination of the sufficiency of such evidence. See Excello Feed Milling Co. v. United States Fidelity & Guaranty Co., 145 Miss. 599, 608, 111 So. 94 (1927) ("a ground for the reversal of a judgment is waived when the brief of the appellant contains no reference thereto was expressly decided in N.M. & C.R.R. Co. v. State, 110 Miss. 290, 70 So. 355"); McCaleb v. McCaleb, 110 Miss. 486, 70 So. 563 (1915), modified, 113 Miss. 337, 74 So. 275 (1917) (a question, not raised either by assignment of error or mentioned in brief of the appellant, need not be considered on appeal).

We do note, however, that the lewd-intent element clearly distinguishes the police officers, who secretly recorded Gilmer without his consent for an evidentiary purpose, from *Gilmer, against whom evidence was presented of his recording Clayton without her consent in a manner to conceal his activities, zooming in on Clayton's crotch and chest areas, engaging in back-and-forth hand motions behind the wheel during recording, and stating on the night of his arrest, "Ain't it funny what p**** will make you do?" As such, the dissent can rest assured that a per se violation of this statute is not established when a television reporter simply records persons in the locker*

> *room or when a private investigator simply records night-time adulterous activities. The dissent's conclusion that people all over the state are in danger of committing a felony simply because they are using a recording device is unfounded. The only person in danger of a conviction under this statute is one for whom each element, including lewd intent, can be proven beyond a reasonable doubt.*
>
> *Gilmer v. State,* 955 So.2d 829 (Miss. 2007)(Footnote 2, italics added).

Petitioner now seeks to have this court review and interpret the Mississippi's Video Voyeurism. As this Court has oft held:

> When a state statute has been construed to forbid identifiable conduct so that 'interpretation by (the state court) puts these words in the statute as definitely as if it had been so amended by the legislature,' claims of impermissible vagueness must be judged in that light. Winters v. New York, 333 U.S. 507, 514, 68 S.Ct. 665, 669, 92 L.Ed. 840 (1948). This has been the normal view in this Court. Fox v. Washington, 236 U.S. 273, 277, 35 S.Ct. 383, 384, 59 L.Ed. 573 (1915); Beauharnais v. Illinois, 343 U.S. 250, 253, 72 S.Ct. 725, 728, 96 L.Ed. 919 (1952); Mishkin v. New York, 383 U.S. 502, 506, 86 S.Ct. 958, 962, 16 L.Ed.2d 56 (1966).

Wainwright v. Stone, 414 U.S. 21, 23 (1973).

It is the position of the State of Mississippi that the statute and the holding of the Mississippi Supreme Court clearly define and limit the conduct that is considered criminal. All the while considering and addressing the concerns of Constitutional due process and freedom of expression.

Additionally, the Mississippi Supreme Court correctly holds that the elements of the offense must *all* be present to support a conviction. Thus, overcoming the claim the statute would be applied to individuals that innocently might photograph someone.

Moreover, there is really no argument presented (other than that raised in the dissenting opinion) of how it is vague, ambiguous or overbroad. What petitioner does argue is the potential applicability of our criminal statute against television sports cameramen, or private investigators. (Pet.Br. Pp.6-7).

> The traditional rule is that a person to whom a statute may constitutionally be applied may not

> challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.
>
> *New York v. Ferber,* 458 U.S. 747, 767 (1982).

It is also worth noting that Petitioner does not once claim *his* conduct was not criminal. Petitioner asserts the statute is vague or overbroad; the woman knew he was filming her; or, that others might be prosecuted. Such contentions are not legally sufficient to overcome the presumption that the Mississippi Supreme Court correctly interpreted the statute to be within Constitutional limits.

In reviewing this Courts holding in *City of San Diego, Cal. v. Roe*, 543 U.S. 77 (2004), it is arguable that petitioner's conduct (County constable filming a woman while masturbating in official county car) is *not* protected as free speech or freedom of expression.

Because petitioner has failed to present any cognizable claim the petition for writ of certiorari should be denied.

CONCLUSION

For the above and foregoing reasons the State of Mississippi asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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